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## THE WRIT OF CERTIORARI.

### I. *History of the Writ in England.*

MANY of the present features of the writ of *certiorari* — which is to-day, in our country, the chief means by which the courts review administrative action — can be understood only by a study of its early history. Like most of the English writs, it was originally a prerogative writ; *i.e.* it was issued by the King by virtue of his position as fountain of justice and supreme head of the whole judicial administration. But unlike most of its fellows, which have become what are known as writs *ex debito justitiæ*, or writs of right, the *certiorari* has preserved to a great extent — perhaps to a greater extent than any other writ — its original characteristics as a prerogative writ.

What now is meant, more precisely, by a prerogative writ? To answer this question requires an acquaintance with the position of the Crown in the administration of justice at the time that this writ was developed.

One of the most important powers which accrued to the Anglo-Saxon chieftains in the transition from the ducal to the royal dignity was judicial supremacy. The King was the supreme head of the nation with power over life, limb and property. The judicial supremacy did not, however, give him the right of pronouncing judgment; for this, in accordance with the Teutonic institution of popular courts, belonged to the members of the community. What it gave him was power to appoint the persons, *viz.* the sheriffs, who as royal representatives called the popular courts together; to see that justice was rendered in case of its denial; personally to judge those powerful litigants who could not be controlled by the popular courts; and to execute or have executed the sentences of the courts.<sup>1</sup>

<sup>1</sup> Gneist, *Constitutional History of England* (English translation, G. P. Putnam's Sons), vol. i, p. 23.

In the Anglo-Saxon system of administering justice the Norman conquest at first introduced less change than in the other branches of government. While in other matters the early Norman Kings were absolute, in matters pertaining to the administration of justice the system was much the same as before the conquest. William the Conqueror bound himself solemnly to "maintain the good and well-tried laws of Edward the Confessor." This promise meant that the law should be administered "by the same persons, and for the same persons, and according to the same principles as in the Anglo-Saxon days."<sup>1</sup>

It is to be noted, however, that the Norman Kings reserved to themselves from the beginning the decision of all cases affecting the Crown, — including the more important criminal offences, which were regarded as violations of the King's peace, — and also all cases affecting the revenue.<sup>2</sup> The judicial proceedings which these cases necessitated were had before the King and the advisers whom the transaction of public business had forced him to summon to his side, and who, when united, formed what was known as the *Curia Regis* or *Aula Regis*, the court or household of the King.<sup>3</sup> Here the barons acted as judges, the King on their advice giving sentence. Soon this essentially judicial business, which was continually increasing, was attended to always by the same persons, and these persons got the name of justices, one of them being called the chief justice or justitiar. This *Curia Regis* soon increased its jurisdiction. The ancient customary process of the local courts, with that strict maintenance of formalities and that incapacity for regarding equitable considerations which seems inseparable from the ideas of compurgation and ordeal, was becoming antiquated. As a special favor, suits that belonged before the popular courts were allowed to be brought before the *Curia Regis*, to be decided by such new methods as the wisdom of the King and his counsellors might invent; and from the *Curia Regis* began soon to issue a series of writs which directed

<sup>1</sup> Gneist, *op. cit.* p. 165.

<sup>2</sup> *Ibid.* pp. 168, 171.

<sup>3</sup> Stubbs, *Constitutional History of England*, vol. i, pp. 387-390.

inquiry and recognition of rights as to land, the obligations of tenure, the legitimacy of heirs and the enforcement of local justice. These writs were undoubtedly derived from the process of the Carolingian lawyers. They were the expedients by which the *jus honorarium* of the King as fountain of justice was enabled to remedy the defects of the *jus civile* or *commune* as applied in the local popular courts.<sup>1</sup> The extension of the jurisdiction of the Curia Regis was accelerated by the partiality of the sheriffs who held the popular courts, and by the fact that in these courts race prejudices were found to influence the decisions.<sup>2</sup> Soon the officers of the Curia Regis were sent about the country; at first, in the time of Henry I, with no great regularity; but later, periodically.<sup>3</sup> These officers were known as the itinerant justices or the justices in eyre. They sat in the local courts, often taking the place of the sheriff.<sup>4</sup>

In 1178 Henry II made great changes in this system. He found that there were too many justices in the Curia Regis to do the work effectively. He therefore chose five of his own immediate servants, two clerks and three laymen, before whom he ordered the complaints of the people to be brought, but reserved the most difficult cases for his own hearing, to be decided as before, *i.e.* in the Curia Regis. This delegation of certain of the justices "to hear all complaints and do right" is regarded as the origin of the court of King's Bench, because the five judges chosen were to sit *in banco*. All financial suits, *i.e.* suits relating to the royal revenue, were still to be decided by the old Curia Regis, which, when organized for this purpose, was known as the Exchequer. As a result of *Magna Charta*, which provided that free persons and free property were to be judged according to the law of the land, a special court split off from the Exchequer. The Exchequer proper henceforth exercised administrative functions only. The new special court came to be known as the court of the Exchequer. It was organized similarly to the court of King's Bench. The adoption of *Magna Charta* resulted also in the formation of another court, *viz.* the

<sup>1</sup> Stubbs, *op. cit.* I, pp. 387-391.

<sup>2</sup> Gneist, *op. cit.* I, 168.

<sup>3</sup> 22 Henry II, Statute of Northampton.

<sup>4</sup> Gneist, *op. cit.* I, 392.

court of Common Pleas. Magna Charta provided that the *communia placita*, common pleas or civil suits, were to be held at some fixed place and were not to follow the King about on his journeys throughout the country; accordingly, the seat of this court was fixed at Westminster.<sup>1</sup> The itinerant justices of the Curia Regis were soon replaced by the justices of *nisi prius* and assize, who were members of the royal courts.<sup>2</sup> In this way the entire administration of justice fell into the hands of the judges of the royal courts. But notwithstanding the formation of these common law courts, the King remained as before the fountain of justice; for, as we have seen, at the time of the formation of the court of King's Bench the King reserved to himself the decision of the most difficult cases. This reserved justice resulted later in the formation of other courts which have played a most important part in the development of English law.<sup>3</sup> Further, the development of these royal law courts did not shut the people out of all participation in the administration of justice. The judges appointed by the King were for the most part officers of a professional character; that is, they were educated in the law; but it was only the decision of the question of law that was taken out of the hands of the people and given into the hands of these judges. The decision of the question of fact was still rendered by the people, or by committees of the people which developed into the English jury.

By the end of the thirteenth century, as a result of this development, the judicial supremacy of the King was something quite different from what it had been at the beginning of the Norman period. The King was now the supreme head of the judicial system, the fountain of justice, in a sense until then unknown to the middle ages. He was in judicial matters what he was in other matters — practically absolute. All the judges, both at the centre and in the localities, were paid servants of the King and subject to his disciplinary power.<sup>4</sup> While actually

<sup>1</sup> Stubbs, *op. cit.* I, 486, 601; Gneist, *op. cit.* I, 386.      <sup>2</sup> 13 Edw. I, c. 30.

<sup>3</sup> Stubbs, *op. cit.* I, 603; Palgrave, *Essay on the Authority of the King's Council*.

<sup>4</sup> For example, we find Edward I removing his chief justice and fining others for extortion and corruption. Gneist, *op. cit.* I, 391.

working on separate lines, the three central courts remained formally connected with the King's personal representative, the Chancellor. From his office proceeded all the writs which were formulated by the King and his advisers, and by which actions were commenced.<sup>1</sup> By the time the royal courts were fully developed most of these writs were no longer writs of grace, granted by the King in his good pleasure, but were issued to litigants upon proper demand *de cursu* and became known finally as writs *ex debito justitiæ*. Before long the court to which the application was made issued the necessary writ directly, without the intervention of the Chancellor.<sup>2</sup>

It was thus that the court of King's Bench received the power to issue a series of writs — *viz. mandamus, certiorari*, prohibition and *quo warranto* — through which it controlled the action of the other courts. The King's Bench was regarded as the highest court in the land, with a superintendence over all other courts; and, as there was no conscious distinction between justice and administration in these early days, over all lower authorities, whatever their nature. This position of superiority over the other authorities was due to the fact that the King was supposed always to sit in the King's Bench.<sup>3</sup> But although the writs just mentioned were issued without the intervention of the Chancellor, they never became writs *ex debito justitiæ* or *de cursu*, since it was only in extraordinary cases that they were issued and only when some gross injustice was being done by other authorities. It remained the function of the King, through his

<sup>1</sup> "The defendant in the cases in the royal courts was summoned into court by writ original under the King's seal," which was kept in the office of the Chancellor. Palgrave, *op. cit.* p. 8.

<sup>2</sup> Thus King John gave to the Chief Justiciar authority to issue five writs; among them the important real-property writs of *mort d'ancestor*, novel disseizin and *de recto*. In the time of Edward I the clerks of the Chancellor were also allowed to issue in plain cases new writs *in consimili casu*, from which came the action on the case. — Gneist, *op. cit.* I, 394; Palgrave, *op. cit.* pp. 16, 17; Reeves, History of the English Law, II, 394, 507, 605.

<sup>3</sup> The King's Bench was the "*curia ubique fuerimus in Anglia*," Bracton speaks of its judges as "chief, general, perpetual and superior, residing by the side of the King, who are to correct the injustice and errors of all others." See Gneist, *op. cit.* I, 384.

court of King's Bench,<sup>1</sup> to judge of the necessity for their issue, and they accordingly came to be known as prerogative writs. And they came to be regarded as among the most important judicial remedies. It must, however, be remembered, when we speak of judicial remedies or of judicial bodies in these early times, that we do not mean what would be meant at the present time by such expressions. As has been shown, the judges of these tribunals had no fixed tenure. Like other royal officers, they were subject to the disciplinary power of the King; and the King not unfrequently made use of his power to influence their decisions.<sup>2</sup> Not only was the tenure of the judges the same as the tenure of royal officers in general, but there was no distinction made between judicial and administrative business. The justices of the peace, who had become the most important administrative officers in the localities (taking the place originally occupied by the sheriffs), had many important judicial duties to perform, and were regarded as judges — just as much so as the members of the royal courts. The court of King's Bench had powers of control over the justices of the peace, just as it had over all other authorities. It controlled the administration of government as well as that of justice. The reason why the King permitted the court of King's Bench to exercise such a control over administrative matters is to be found in the tenure of its judges, and in the fact that the King had still powers of reserved justice. He could exercise the strongest personal influence over the judges of the royal courts; and, if he found that the administration of the law was becoming too formal and technical to permit of efficient administration, he might exercise his reserved powers and transfer any matter to

<sup>1</sup> Some of these writs were issued by the Council, *i.e.* the Curia Regis, even after the development of the court of King's Bench. Thus the first case of *mandamus* on record, in the time of Edward II, was returnable to the Council. 1 Ryley's Pleadings, 534. But a case is referred to in Burrow's Reports, p. 2190, where this writ issued from the King's Bench. The first recorded case of *quo warranto* is found on the roll of the Curia Regis. Abbreviatio Placitorum, p. 21. Later, however, the King's Bench obtained the practically exclusive power to issue these prerogative writs.

<sup>2</sup> Witness the famous Hampden case in the court of the Exchequer. The judges were for the first time made independent of the King by the Act of Settlement, 1701.

a newly created jurisdiction.<sup>1</sup> Thus was formed in the time of Henry VII the court of the Star Chamber, in order to control the nobility who had grown turbulent during the Wars of the Roses.<sup>2</sup> To this court was given a control over the actions of the justices of the peace which aimed at correcting not merely their decisions upon questions of law,—these were practically the only questions that came up before the King's Bench,—but also their decisions on questions of fact and of expediency.<sup>3</sup> Established originally to protect the weaker classes from the tyranny of the nobility, this court was used by the Stuarts in a fashion that led to its abolition in 1640. The result of its abolition was to remove the justices of the peace from all central control except that which was exercised by the court of the King's Bench over their decisions on questions of law. To provide some sort of control over the justices acting separately, which should extend to their decisions on questions of fact and expediency, a series of acts of Parliament permitted the individual, when injured by the act of a justice, in specified cases to appeal to the court of Quarter Sessions of the county.<sup>4</sup> This court consisted of all the justices of the county sitting together. As a result of these statutes, appeals might be taken to the Quarter Sessions from almost all acts of the justices affecting property rights or personal liberty.<sup>5</sup> There was thus formed in each county, for the decision of administrative questions, a court whose jurisdiction embraced both questions of law and questions of fact or expediency. Further, the commission of the justices of the peace enjoined upon them in difficult cases to take the

<sup>1</sup> Cf. Palgrave, *op. cit.* pp. 57–61.

<sup>2</sup> Other instances of the exercise of the reserved justice of the King are to be found in the establishment of the court of Chancery and of the Council of the North and the Council of the West. To deal with the religious questions resulting from the Reformation was established the court of High Commission. Later examples may be found in the establishment of the Probate and Divorce courts, after this jurisdiction had been taken away from the ecclesiastical courts, and finally in the Judicial Committee of the Privy Council for ecclesiastical and colonial appeals. Cf. Stubbs, *op. cit.* I, 603.

<sup>3</sup> Cf. Palgrave, *op. cit.* pp. 101–108.

<sup>4</sup> See Smith, *Practice at Quarter Sessions* (London, 1882), title Appeals.

<sup>5</sup> Gneist, *Das Englische Verwaltungsrecht* (1884), p. 397.



advice of the royal courts. This came to be done finally by stating a case which was agreed upon by the justices and the parties before them, and which was then submitted to the royal courts and was finally decided by them.<sup>1</sup>

In consequence of these facts the certiorari lost much of its earlier importance in England, and its employment there became less frequent.<sup>2</sup> It had served the purpose of bringing proceedings of the justices, and of subordinate tribunals generally, before the King's Bench for review.<sup>3</sup> It was often used as a sort of an appellate proceeding, *e.g.* against the convictions and orders of justices of the peace;<sup>4</sup> but it was more often used for the purpose of removing a case before final judgment, where for some reason it was believed that a fair and impartial trial could not be had. Indeed the most common use of the writ in early times seems to have been to remove indictments before the justices. The reason why it was less often employed in appellate proceedings is to be found in the existence of the other methods of appeal from the final judgments of the justices which have been pointed out. Finally, the certiorari was also used in the course of ordinary appellate proceedings to bring up the record of the lower court from whose decision appeal had been taken, on the ground that the record as sent up was incomplete. This was called technically "certiorari for diminution of the record."<sup>5</sup> The writ of certiorari was therefore used from the beginning for three distinct purposes; first, as a means of removing a cause; second, to review a determination; and third, as means of correcting diminution in another proceeding — *i.e.* as an auxiliary remedy.

It is to a consideration of the certiorari as an independent appellate proceeding that this article will be devoted. In our country this is by far its most important use; because, for a number of reasons, we have been unable to develop generally any such

<sup>1</sup> Smith, *op. cit.* p. 518.

<sup>2</sup> Gneist, *Verwaltungsrecht*, p. 406.

<sup>3</sup> The certiorari "lieth where the King would be certified of any record." Fitzherbert, *Natura Brevium*, p. 554. "The end of the writ is that more sure or speedy justice be done." Bacon's *Abridgement*, I, 559.

<sup>4</sup> Hawkins, *Pleas of the Crown*, vol. iv, p. 145, §§ 3, 4, p. 156.

<sup>5</sup> Tidds' *Practice*, 1167, citing *Cro. Eliz.* 155.

methods of appeal from administrative decisions as have been created in England—any such methods as the appeal to the Quarter Sessions or the “statement of the case.” There are, indeed, throughout our Southern commonwealths instances of appeals from the decisions of administrative officers to the county courts (which have largely taken the place in this country of the English courts of Quarter Sessions); and there are a very few instances of such appeals in other commonwealths. But in general our only method of appeal from administrative decisions has been by certiorari, and we have therefore been obliged to give to this writ a development which has greatly enlarged its scope and usefulness. Before I attempt to trace this development, it will be well to indicate how far the certiorari has retained its original prerogative characteristics, and what courts may issue the writ in the United States.

## II. *Character of the Writ in the United States.*

In this country the general tendency has been to strip the certiorari of its prerogative character, and to reduce it to the position of an ordinary action. Nevertheless, even at the present time, the writ bears very plainly the stamp that was impressed upon it at its origin. Thus, for example, certiorari does not issue of course, as does the ordinary summons in an action; application has to be made to the proper court, and this may refuse or grant the application for the issue of the writ in its own discretion.<sup>1</sup> In the exercise of this discretion the courts have laid down several rules by which they will be guided.

(1) They will not issue the writ if there is any other adequate remedy; *i.e.* certiorari is an extraordinary remedy. Adequate remedies have been held to exist where it is possible to obtain a writ of error,<sup>2</sup> or to appeal, even to an administrative

<sup>1</sup> *Duggen vs. McGruder*, 1 Miss. 112; *People vs. Mayor*, 2 Hill (N. Y.) 9; *Matter of Mount Morris Square*, *Ibid.* 14. See also section 2127 of the New York Code of Civil Procedure. This section of the code has been construed by the New York Court of Appeals as providing that the decision of the court withholding or granting the issue of the writ cannot be reviewed in the Court of Appeals. *People vs. Stillwell*, 19 N. Y. 531; *People vs. Hill*, 53 N. Y. 547; *People vs. Commissioners*, 82 N. Y. 506.

<sup>2</sup> *Petty vs. Jones*, 1 Iredell L. (N. C.) 408.

authority,<sup>1</sup> or to apply for any statutory remedy.<sup>2</sup> The only important exceptions to this rule are to be found in some cases where an appeal lay on the merits, and where nevertheless certiorari was issued to test the question whether the tribunal whose record was to be brought up had exceeded its jurisdiction;<sup>3</sup> and in certain other cases, especially in North Carolina and Tennessee, where it is held that if one without fault has lost the right to appeal, he may get a certiorari if the time for appeal has gone by.<sup>4</sup>

(2) The courts have held that they will not issue a certiorari where the party applying for it is guilty of laches and has slept upon his rights.<sup>5</sup>

(3) The courts will not issue a certiorari where substantial justice has been already done, or where very mischievous consequences will result from its issue, or where the parties cannot be placed *in statu quo* by its issue,<sup>6</sup> or for a mere defect in form<sup>7</sup> or of jurisdiction.<sup>8</sup>

(4) Finally the courts have held that the certiorari may not be used simply for the purpose of the maintenance of the law. That is, persons applying to the courts for the issue of the writ

<sup>1</sup> Beck *vs.* Knabb, 1 Overt. 55, 59, 60; Storm *vs.* Odell, 2 Wendell (N. Y.) 287; O'Hare *vs.* Hempstead, 21 Iowa, 33; N. Y. Code, sec. 2122, paragraph 2.

<sup>2</sup> Tucker's Petition, 27 N. H. 405; Baldwin *vs.* Goodyear, 4 Cowen, 536. See also Harwood *vs.* French, 4 Cowen, 501.

<sup>3</sup> Kingsland *vs.* Gould, 3 N. J. L. 161; Krummick *vs.* Krummick, 14 N. J. L. 39; Burrows *vs.* Vandervier, 3 Ohio, 383.

<sup>4</sup> Trice *vs.* Varborough, 4 Iredell L. (N. C.) 11; Kearney *vs.* Jackson, 1 Verg. (Tenn.) 294; Skinner *vs.* Maxwell, 67 N. C. 257; King *vs.* Williams, 7 Heiskell (Tenn.) 303.

<sup>5</sup> *Ex parte* Hagaman, 2 Hill (N. Y.) 415; Bannister *vs.* Allen, 1 Blackford (Ind.) 415; Holden *vs.* Commissioners, 7 Metcalf (Mass.) 561; Elmendorf *vs.* Mayor, 25 Wendell, 693; Bentz *vs.* Detroit, 48 Mich. 544; Carpenter *vs.* Commissioners, 64 Mich. 474. The time within which the writ may be applied for is sometimes fixed by statute. Thus the N. Y. Code, section 2125, allows four months after the determination in which to issue and serve a certiorari reviewing the determination.

<sup>6</sup> Hancock *vs.* Boston, 1 Metc. (Mass.) 122; Rutland *vs.* Worcester, 20 Pick. (Mass.) 71; Gleason *vs.* Sloper, 24 Pick. 181; People *vs.* Supervisors, 15 Wendell, 198; People *vs.* Rochester, 21 Barb. 656.

<sup>7</sup> Elmendorf *vs.* Mayor, 25 Wendell, 693; Monterey *vs.* Berkshire, 7 Cushing (Mass.) 394; Smith *vs.* Commissioners, 42 Me. 395, 402; Criswell *vs.* Richter, 12 Texas, 18.

<sup>8</sup> Fowler *vs.* Lindsey, 3 Dallas (U. S.) 411, 413.

must show to the satisfaction of the court that they have some special interest involved which is peculiar to themselves and that the issue of the writ will result to their advantage.<sup>1</sup> Thus the courts have refused the issue of a certiorari to declare a municipal ordinance void, where the applicant for the writ had been convicted of its violation and had paid the fine imposed ;<sup>2</sup> or to reverse the action of an authority in laying out a drain, where the applicant for the writ could show no personal injury from the action complained of. The simple allegation also that the applicant was a resident and a taxpayer has been held to be insufficient to justify the issue of the writ in the absence of any further special interest.<sup>3</sup> Such are the prerogative characteristics of the writ of certiorari at the present time.

### III. *What Courts may Issue the Writ.*

As the certiorari is a writ of an extraordinary character, it is not every court that is permitted to issue it. It has already been shown that in England, after the disintegration of the King's Council and the development of special royal courts, it was the court of King's Bench that possessed the power to issue the extraordinary legal remedies or prerogative writs of which the certiorari was one. As a result of this fact, the rule in the United States seems to be that certiorari as a means of appeal issues only from these courts which have inherited the jurisdiction of the English court of King's Bench. What courts have inherited this jurisdiction is usually determined by the constitutions or statutes of the separate commonwealths. In New York the code of civil procedure, section 2123, provides that where no special exception is made by law, certiorari to review a determination can issue only out of the Supreme Court or a superior city court. But while the matter is thus governed largely by special statute, still two general principles may be laid down :

<sup>1</sup> *People vs. Leavitt*, 41 Mich. 470; *People vs. Walter*, 68 N. Y. 403; *People vs. Phillips*, 67 N. Y. 582.

<sup>2</sup> *People vs. Leavitt*, 41 Mich. 470.

<sup>3</sup> *State vs. Lamberton*, 37 Minn. 362. See also *Granville vs. County Commissioners*, 97 Mass. 193; *Waston vs. May*, 6 Ala. 133; *Davis Co. vs. Horn*, 4 Greene (Iowa) 94.

(1) Certiorari may not ordinarily be issued by courts of limited jurisdiction, but only by courts of general common-law jurisdiction, since it is only the latter class of courts that have inherited the jurisdiction of the court of King's Bench.

(2) The issue of the writ is an exercise of an original jurisdiction; and therefore courts whose jurisdiction is appellate only cannot, in the absence of statutory provisions, issue the writ to review a determination. Of course appellate courts do issue the writ when it is used for the purpose of correcting diminution.

As far as the United States courts are concerned, it may further be laid down, as a general principle, that they have not the power to issue certiorari to review a determination. Several cases have decided that certiorari will not issue from the Supreme Court except in case of diminution,<sup>1</sup> or from the circuit courts except as an auxiliary remedy;<sup>2</sup> while the same reasons which forbid the higher courts to issue the writ—*viz.* the absence of the grant of such jurisdiction in the constitution or in the judiciary act—would seem to preclude its issue by the district courts. There seems, however, to be no reason why the Supreme Court of the District of Columbia should not have the power to issue the writ of certiorari; for it is well settled that it has the power to issue the *mandamus*, and this latter power is derived from the fact that it has inherited for the territory of the District of Columbia the jurisdiction of the King's Bench.<sup>3</sup>

It should be noted that the McKinley administrative act gives the circuit courts of the United States power to issue certiorari to review the determination of the general appraisers as to rates of duties and classification of articles. The effect of this will at once be seen, when it is remembered that by this act suits against the collector of the customs may no longer be entertained by the United States courts. Where there was

<sup>1</sup> *In re Kaine*, 14 Howard, 103, 131; *Ex parte Metzger*, 5 Howard, 176; U. S. *vs. Young*, 94 U. S. 258, 259; *Ex parte Vallandigham*, 1 Wallace, 243.

<sup>2</sup> *Ex parte Van Orden*, 3 Blatchford, 167. See also *Patterson vs. U. S. 2 Wheaton*, 221.

<sup>3</sup> See *Kendal vs. U. S.* 12 Peters, 524.

previously a remedy of right, a writ *ex debito justitiæ*, there is now only a prerogative remedy which the court may grant or refuse in its discretion.

#### IV. *Authorities Subject to the Writ.*

Certiorari to review a determination was employed from the outset as a method of appeal from the decisions of authorities or tribunals not acting in accordance with the common law, — *i.e.* created by statute and possessing only a limited jurisdiction.<sup>1</sup> The regular method of appealing from the decisions of authorities possessed of general common-law jurisdiction was by writ of error. Among the authorities subject to certiorari were included all quasi-public bodies, — *e.g.* the disciplinary authority in a profession or the visitors of a foundation, — as this was the only way by which their proceedings could be kept within the law.<sup>2</sup> Originally the justices of the peace were the officers to whom certiorari was most frequently issued. They formed the most important class of authorities not acting in accordance with the common law. Now the justices of the peace had both judicial and administrative functions to discharge; but these two classes of functions were not clearly distinguished. Their administrative functions were treated as judicial, largely because they were discharged by officers who had come to be recognized as judges. In this country, however, justice has been separated from administration. This separation began in New York with the establishment of the office of supervisor in 1683; and it has

<sup>1</sup> *Rex vs. Inhabitants in Glamorganshire*, 1 Ld. Raymond, 580; Bacon's Abridgment, art. Certiorari, B.

This rule has been very generally adopted in the United States. *Commonwealth vs. Ellis*, 11 Mass. 464; *Ex parte Tarleton*, 2 Ala. 35, citing cases; *Commonwealth vs. Low*, R. M. Charleton (Ga.) 298; *Ruhlman vs. Commissioner*, 5 Binney (Pa.) 24; *Phillips vs. Phillips*, 8 N. J. L. 122; *Trigg vs. Boyce*, 4 Hayward (Tenn.) 100; *Williams vs. Carman*, 1 Gill & J. 184, 196; *Matthews vs. Matthews*, 4 Iredell (N. C.) 155; *Bridge Co. vs. Magoun*, 8 Greenleaf (Me.) 292, 293; *Appeal of Commissioners*, 57 Pa. St. 452.

<sup>2</sup> See a very interesting case, *Groenvelt vs. Burwell*, 1 Salkeld, 263, 1 Ld. Raymond, 580, in which it was held that certiorari lay to review a judgment given by the censors of the College of Physicians and Surgeons. For a similar case in the United States, see *State vs. Swift*, 2 Hill (S. C.) 367.

become so general that almost all administrative work is attended to, at any rate in first instance, by officers unconnected with the administration of justice, such as supervisors, assessors, highway commissioners, overseers of the poor, selectmen, *etc.* When this separation of administration from justice was accomplished, it was questioned whether the courts could make use of certiorari to review the acts of the new administrative authorities. They had indeed always used the writ to review the acts of persons discharging similar functions; but these persons had been regarded as judicial officers, while the new authorities were purely administrative.

The question was not ordinarily stated in the form here indicated. It was generally stated thus: May the courts issue certiorari to review other than judicial acts? And, following old traditions, some of our courts early laid down the rule that they would not issue certiorari to review a ministerial or legislative act, but would confine its use to the review of judicial acts. This rule seems clear and simple; but it has proved to be difficult of application. In determining what is and what is not a "judicial act" it was obviously possible for the courts to consider either the nature of the act itself or the character of the authority performing the act. But if they sought to apply the first of these tests, they were confronted by an ambiguity in the use of the term "judicial act." This was often employed as equivalent to "discretionary act"; and, as we shall see later, it was a rule of the common law that discretionary acts were *not* reviewable on certiorari; so that this line of distinction seemed wholly unavailable. Accordingly the courts sometimes fell back on the second test; and refused to recognize any act as judicial unless it was performed by a court. But there was still a third possible construction. Starting from the principle of the separation of governmental powers, the courts might hold that an act performed by a body not strictly judicial in character was nevertheless an exercise of judicial power as distinguished from executive or legislative power, and therefore a judicial act. It is in fact in this last sense that the courts seem generally to have used the term "judicial act" in

laying down the above rule.<sup>1</sup> Here it is obvious that the courts revert to the attempt to determine the nature of the act itself, although they seek to do this by an appeal to a new standard, *viz.* the nature of the power exercised. But this attempt brings new difficulties. It is a simple matter to say whether or not an act has been performed by an authority which constitutes part of the judicial branch of the government as actually organized; but to determine whether the power exercised by a particular authority in a given case is or is not judicial *in its nature* is anything but a simple matter. It is far from easy to apply the principle of the separation of powers to existing governmental institutions. It is very difficult to discover by its aid any clear line of demarcation between administrative or legislative acts on the one hand and judicial acts on the other. And it is even more difficult to obtain any general agreement upon such questions, for the simple reason that the standard applied is purely subjective. The separation of governmental powers is not a statement of what is, but a theory of what ought to be.

The difficulties here indicated have manifested themselves in almost every concrete case in which the courts have attempted to apply the rule. The difficulty of reaching a decision and the confusion of decisions reached have been especially marked in the matter of the laying out of highways and streets and the building of sewers. The courts of Alabama, Massachusetts and Michigan hold that the action of commissioners of highways or of a common council of a city in laying out highways and streets is judicial in character and may be reviewed on certiorari.<sup>2</sup> The courts of Maine and New Hampshire hold that the same duty, when performed by selectmen of a town, is not judicial and that their act may not be quashed on certiorari.<sup>3</sup> But the courts of the latter state further hold that when this act is performed by a court, *e.g.* the court of sessions or the county court, it is judi-

<sup>1</sup> See *Commissioners vs. Kane*, 2 Jones L. (N. C.) 288.

<sup>2</sup> *Commissioners vs. Thompson*, 15 Ala. 558; *Commonwealth vs. West Boston Bridge*, 13 Pickering, 195; *Parks vs. Boston*, 8 Pickering, 217, 225; *Stone vs. Boston*, 2 Metc. 220; *People vs. Brighton*, 20 Mich. 57.

<sup>3</sup> *Harlow vs. Pike*, 3 Greenleaf (Me.) 438; *Robbins vs. Bridgewater*, 6 N. H.



cial in character and therefore may be reviewed.<sup>1</sup> In New York the power of the courts to issue the certiorari to highway commissioners is doubtful;<sup>2</sup> and the power of the courts to issue the writ to the common councils of cities to review their acts in the matters of streets and sewers is denied.<sup>3</sup> The New York rule is thus opposed to that adopted in Massachusetts, and this opposition is due to the fact that the New York courts could not bring themselves to regard acts which were plainly of an administrative character (or, as the courts say, of a quasi-legislative or ministerial character), as judicial acts. In the case of *People vs. Mayor*,<sup>4</sup> the judge carries the distinction to quite a length in saying that while "an ordinance of the common council for the construction of the sewer . . . was a simple exercise of their ministerial, or, if I may use the expression, legislative power," and while the decision of the council on the question of expediency could not be reviewed; still "it is competent for us in a proper case to vacate the estimate and assessment of the common council in affirming those proceedings, as they then acted in a judicial capacity." That is, if sewers were built from the proceeds of bonds or taxation, no matter how illegal or irregular the ordinance ordering the construction was originally, certiorari would not issue, because the ordinance was not a judicial act; but if the sewers were to be built from the proceeds of assessments for local improvements, certiorari would issue to quash the decision

<sup>1</sup> *Robbins vs. Bridgewater*, 6 N. H. 524; *Dorchester vs. Wentworth*, 31 N. H. 451. This latter rule, that the action of bodies recognized as courts in laying out highways is judicial and subject to the writ of certiorari, seems to be the general one. See *Nichols vs. Sutton*, 22 Ga. 309; *French vs. Barre*, 50 Vt. 567; *Prigden vs. Bannerman*, 8 Jones L. (N. C.) 26; *Ex parte* District of Pittsburgh, 2 Watts & Sergeant (Pa.) 320; *Thompson vs. Multonomah Co.*, 2 Oregon, 34.

<sup>2</sup> See *Lawton vs. Commissioners*, 2 Caines Rep. 179; *People vs. Covert*, 1 Hill, 674; *Fitch vs. Commissioners*, 22 Wendell, 132.

<sup>3</sup> Thus the New York courts have held that a city ordinance directing the building of a sewer or the opening or widening of streets is not a judicial act and is therefore not reviewable on certiorari. *People vs. Mayor*, 2 Hill, 9; *People vs. Mayor*, 5 Barb. 43; *Matter of Mount Morris Square*, 2 Hill, 14. Two of the cases holding this view (*viz.* 2 Hill, 9 and 5 Barb.) are not very strong, inasmuch as the certiorari was refused partly, at any rate, on the ground that the issue of the writ was discretionary with the court. But in both cases the distinction between judicial and other acts seems to have influenced the decision.

<sup>4</sup> 5 Barb. 43.

as to the assessment if it was based upon an illegal ordinance, since the act of assessment was a judicial act.<sup>1</sup> In the Matter of Mount Morris Square,<sup>2</sup> which is a particularly interesting case, Judge Cowen takes somewhat the same position. He criticises the attempts (particularly in the case of *Parks vs. Boston*),<sup>3</sup> to classify acts purely legislative or administrative in character under the head of judicial acts, and explains these attempts as due to the fact that municipal authorities have been assimilated with the English commissioners of sewers, who (he says) were regarded as courts.<sup>4</sup> He thus seems to adopt the rule that the character of the act is determined by the character of the body which performs it. He soon, however, departs from this standard and adopts the rule that the character of the act is determined by the character of the power exercised: for he proceeds to analyze the acts of municipal corporations and their officers and finds that they consist, in the first place, of what he calls corporate acts, *e.g.* the making of by-laws, voting taxes, appointing officers; in the second place, of governmental powers, *e.g.* the power of eminent domain for streets; in the third place, of really judicial powers, *e.g.* the power to assess property. In this last class of cases alone he believes that certiorari may issue, though he admits, citing *Ex parte Mayor of Albany*,<sup>5</sup> that it had become the fashion to ask for certiorari in the other cases as well. He cites the case of *Leroy vs. Mayor*<sup>6</sup> as the cause of all the trouble in New York, since it allowed the writ to issue to the corporation instead of to the commissioners of assessments. The result of this opinion and of the determined attempt on the part of Judge Cowen to prevent any confusion as to what was a judicial act<sup>7</sup> was to keep the law of New York, for a time at least, in line with his

<sup>1</sup> See as to this point *People vs. Mayor*, 9 Barb. 535, 542.

<sup>2</sup> 2 Hill, 14.

<sup>3</sup> 8 Pickering, 217.

<sup>4</sup> This point has really very little force; for in England, as has been pointed out, no distinction was originally made between administrative and judicial bodies.

<sup>5</sup> 23 Wendell, 277.

<sup>6</sup> 20 Johnson, 430.

<sup>7</sup> But even after his explanation, the distinction between judicial and other acts was not very clear. See *Rochester White Lead Co. vs. the City of Rochester*, 3 N. Y. 463, 467.

theory — and to give less protection to private rights than the Massachusetts rule afforded.<sup>1</sup> Thus in the case of *People vs. The Board of Health*,<sup>2</sup> the judge bases his decision upon this general rule, that the act must be judicial in character, saying :

I cannot adopt the conclusion that it is in any sense proper to review the legislation of any body having authority so to do, even where in the course of such legislation they might exceed the powers vested in them.

This New York rule seems to have gained a foothold in Ohio.<sup>3</sup>

Such is the result of the attempt to apply to actual practice the rule that certiorari will issue only in case the act to be reviewed is a judicial act. In the concrete case of highways and the like, the Massachusetts rule differs from the New York rule and, while it affords fuller protection to private rights, is less logical ; and in New Hampshire the whole question is made to turn on the character of the body performing the act. If performed by the selectmen, the act is not judicial and may not be reviewed ; if performed by a court of sessions, a well-recognized judicial body, the same act is metamorphosed into a judicial act and may be reviewed on certiorari.

The rule is therefore practically unsatisfactory, — a fact which has been recognized by the courts of several commonwealths, but first and most clearly by those of New Jersey. The New Jersey courts have wholly rejected it, and have taken the ground that ordinances passed by a city council may be reviewed on certiorari, not because they are judicial acts, but because of the general principle that the courts have power on certiorari to remedy wrongs inflicted upon individuals whether by corporate acts or by the acts of special jurisdictions created by statute.<sup>4</sup> In the case of *Camden vs. Mulford* the judge who delivers the opinion of the court says that, before the attack of Judge Cowen already spoken of, evidence of the belief in the existence of this general principle is to be found in some of the New York cases. And it is to be noted that in some of the earlier cases cited later in this article — particularly in the

<sup>1</sup> Cf. Dillon, *Municipal Corporations* (4th ed.), II, 1126, notes.

<sup>2</sup> 20 How. Pr. 458, 460.

<sup>3</sup> *Dixon vs. Cincinnati*, 14 Ohio, 240.

<sup>4</sup> *State vs. New Brunswick*, Coxé (N. J.) 393 ; *Camden vs. Mulford*, 26 N. J. L. 49.

Cardiff Bridge case — the English judges seem to have been of the same opinion. The only objection to the New Jersey rule would seem to be found in the old distinction between void and voidable acts. It is claimed that certiorari is unnecessary in the case of a void act, because such an act may be impeached collaterally; that all acts not judicial, when done in excess of jurisdiction, are void; and therefore that certiorari should not issue to declare them so. From the standpoint of legal logic it may be answered that a judicial declaration of the original nullity of an act is not the same thing as the impeachment of a voidable act, and that certiorari may be used for the former purpose without transforming the act reviewed into a voidable act. As far as historical precedent is concerned, this distinction, as I shall point out later, really never had any great influence upon the issue of the writ in England nor, it may be added, in this country, notwithstanding several dicta to the contrary. As a matter of policy, this distinction is objectionable, because its application would deprive individual rights of a most precious means of protection in a class of cases which is increasing in number with the more complete separation of administration from justice.

The New Jersey rule has been practically adopted in several other commonwealths — though sometimes, apparently, without full consciousness of the fact on the part of the courts. Thus in Maryland it has been held that certiorari will issue to review the action of the mayor and common council of a city in improving the streets; but no reason is given for the decision except the general power of the courts to quash illegal action on certiorari.<sup>1</sup> In Illinois a certiorari issued to review the action of highway commissioners on the broad principle again that “certiorari may issue for the purpose of reviewing the proceedings of all inferior tribunals and jurisdictions where they exceed their power or proceed without authority of law.”<sup>2</sup> The same doctrine seems to be held in Missouri<sup>3</sup> and in a late case

<sup>1</sup> *Swann vs. Mayor*, 8 Gill, 150.

<sup>2</sup> *Detrick vs. Highway Commissioners*, 6 Bradwell, Ill. Appeals, 70.

<sup>3</sup> *St. Charles vs. Rogers*, 49 Mo. 530.

in Maine.<sup>1</sup> The United States Supreme Court has either held or intimated that certiorari is the proper remedy in these cases, though here again no reasons are given.<sup>2</sup> In Wisconsin certiorari has issued to test the validity of the proceedings of a common council in laying out streets,<sup>3</sup> and was said to be the proper remedy to review the revocation of a license by a council.<sup>4</sup> In one Wisconsin case the court was confronted with an awkward alternative. It was called upon to determine whether the decision of the superintendent of public instruction concerning the division of a school district could be reviewed upon certiorari. If the court held that the act of the superintendent was not judicial, it felt obliged to decide that certiorari could not issue. If on the other hand it held that his act was judicial, it would strip him of a series of most valuable powers; since the constitution declared that none but judicial officers should exercise judicial powers, and the superintendent was evidently not a judicial officer in the sense of the constitution. The court, however, was equal to the occasion and succeeded in avoiding both horns of the dilemma. It declared that the act in question, while not absolutely and purely judicial in the sense of the constitution, was yet quasi-judicial — judicial enough to permit the issue of the writ to the superintendent in a proper case. What was really meant by the opinion was that the act of the superintendent, from the point of view of the principle of the separation of governmental powers, was an administrative act of a discretionary character.<sup>5</sup> A very late case<sup>6</sup> in New York, finally, has accepted the Wisconsin point of view, practically reversing the case of *People vs. Board of Health*,<sup>7</sup> cited above. The court holds, though without citation of authorities, that an order of a board of health may be quashed on certiorari, because the duties discharged by boards of health are quasi-judicial.

<sup>1</sup> *Preble vs. Portland*, 45 Maine, 241.

<sup>2</sup> *Ewing vs. City of St. Louis*, 5 Wallace, 413.

<sup>3</sup> *Flint vs. Fond du Lac*, 42 Wis. 287.

<sup>4</sup> *Gaertner vs. Fond du Lac*, 34 Wis. 496.

<sup>5</sup> *State vs. Whitford*, 54 Wis. 150. Same principle: *State vs. Dodge Co.*, 56 Wis. 79.

<sup>6</sup> *People vs. Board of Health*, 12 N. Y., Supplement, 561.

<sup>7</sup> 20 How. Pr. 458.

In view of the above decisions we may safely say, notwithstanding the difficulty experienced by the courts of some of our commonwealths in reaching a satisfactory solution of the question, that the use of the certiorari is not confined to the review of judicial acts; that the writ is applicable in numerous cases where private rights are prejudiced by administrative decisions; and that it furnishes the chief means of subjecting the acts of a host of administrative authorities to the control of the courts. In detail it has been held that certiorari lies to justices of the peace,<sup>1</sup> supervisors,<sup>2</sup> county commissioners,<sup>3</sup> commissioners to assess damages,<sup>4</sup> assessors,<sup>5</sup> commissioners of highways in many cases,<sup>6</sup> and municipal councils and departments.<sup>7</sup>

Not only may certiorari be employed to review administrative decisions, but there is a tendency to limit its use to such cases. At common law certiorari was used to review the decisions of bodies exercising real judicial powers, *i.e.* bodies which decide controversies;<sup>8</sup> but at the present time in the United States the tendency is to provide some other means of appeal against the action of purely judicial bodies and to confine certiorari — *i.e.* certiorari to review a determination — to the action of bodies mainly administrative in character. Thus the New York codes of civil and criminal procedure abolish certiorari to review a determination in a civil or criminal action by a judge or a court of

<sup>1</sup> *Rex vs. Inhabitants of Glamorganshire*, 1 *Ld. Raymond*, 580; *Little vs. Cochran*, 24 *Me.* 509.

<sup>2</sup> *People vs. Supervisors*, 51 *N. Y.* 442.

<sup>3</sup> *Bangor vs. County Commissioners*, 30 *Me.* 270; *Gibbs vs. Hampden*, 19 *Pickering*, 298.

<sup>4</sup> *Ex parte N. J. R.R. Co.*, 16 *N. J. L.* 393.

<sup>5</sup> *People vs. Assessors of Albany*, 40 *N. Y.* 154.

<sup>6</sup> *Commonwealth vs. Coombs*, 2 *Mass.* 489; *Lawton vs. Commissioners*, 2 *Caines (N. Y.)* 179.

<sup>7</sup> *Stone vs. Boston*, 2 *Metc.* 220; *Camden vs. Mulford*, 26 *N. J. L.* 49; *People vs. Mayor, &c.*, 9 *Barb.* 535; *People vs. Rochester*, 21 *Barb.* 656 (this case shows a tendency to depart from the original New York rule); *Whitney vs. Board of Delegates*, 14 *Cal.* 479.

<sup>8</sup> *E.g.* see *Bacon's Abridgment*, title *Certiorari*, B. *Reardon vs. Guy*, 2 *Hayward (N. C.)* 433; *John, a Slave vs. The State*, 1 *Ala.* 95; *Ex parte Couch*, 14 *Ark.* 337.

record, and provide for an appeal.<sup>1</sup> In New York, accordingly, certiorari to review a determination has been specialized into a means of appeal against the action of administrative officers — the very purpose for which the courts at first refused to employ it.

Nevertheless, the writ cannot be used against all officers of the administration. It may not be employed to review the decision of a mere ministerial officer<sup>2</sup> nor the acts of the chief executive of the nation or of a commonwealth.<sup>3</sup>

### V. *Province of the Writ.*

The change above outlined in the use of the writ has carried with it a change in its purpose or province. In order to understand the province of the certiorari to review a determination, it is necessary to bear in mind the rules of the English law regarding appellate proceedings in general ; and first of all the distinction between appellate proceedings at law and in equity. Equitable appellate proceedings, such as "appeals" technically so called and "review," brought up before the appellate court the whole matter in controversy, including questions both of law and of fact, to be tried anew as if the case had never been tried before. Appellate proceedings in law, as distinguished from equity, consisted of the writs of error and certiorari, and brought up for review only questions of law. Among the questions of law upon which appeal might be taken was the question as to the existence in the proceedings of those facts which the law requires to exist in every case in order that there may be no error in law ; such, for example, as the fact that the defendant in the suit had been served with process.<sup>4</sup> The historic basis of this distinction between appellate proceedings at law and in equity is probably to be found in the fact that, at the time when the jurisdiction of the royal law courts was developed, the influ-

<sup>1</sup> N. Y. Code of Civil Procedure, sec. 2121; N. Y. Code of Criminal Procedure, sec. 515. See also, on the general principle, Baylies' *New Trials and Appeals*, p. 17.

<sup>2</sup> *People vs. Walter*, 68 N. Y. 403, 410.

<sup>3</sup> *People vs. Hill*, 13 N. Y. Supplement, 186; *Law Journal*, April 13, 1891; affirmed by the Court of Appeals but not yet reported.

<sup>4</sup> Powell, *Appellate Proceedings*, pp. 44 *seq.*

ence of the popular courts was stronger than at the time of the development of the court of Chancery. In the popular courts questions of law and of fact were both decided by the people. With the development of the royal law courts, the decision of questions of law fell into the hands of the judges, but the decision of questions of fact was left with the representatives of the people, or, later, the jurors. But when the court of Chancery was formed, the balance of influence had so far shifted from people to King that the King was able to invest the Chancery judges with power to decide all questions, whether of law or of fact. Appeals in both cases naturally brought up only those questions which had been decided by the judges from whose decision the appeal was taken: in the one case, only questions of law; in the other, questions both of law and of fact. Certiorari and error were therefore from the beginning means of appealing upon questions of law alone.

The great difference between the writ of certiorari and the writ of error was that the writ of error was issued to tribunals having full common-law jurisdiction, courts which decided controversies; while certiorari was issued to tribunals not acting in accordance with the common law, *i.e.* tribunals of limited jurisdiction — jurisdiction granted by statute and largely administrative in character.<sup>1</sup> This fact had great influence on the original province of the writ of certiorari to review a determination. The most important authorities to whom the writ was originally issued (*viz.* the justices of the peace) did not so much decide controversies as administer government. Their most important duties, the exercise of which the court of King's Bench was most frequently called upon to review on certiorari, consisted in deciding questions of fact and expediency. Unlike the courts of general common-law jurisdiction, they had not to establish and develop the rules of the substantive law; they had simply to apply the established rules to what they found to be the facts of each case. Of course the application of legal rules involves their interpretation, and, equally of course, it was possible for these courts to misinterpret the substantive law;

<sup>1</sup> See *supra*, p. 505.



but the main questions of law which they determined (and had to determine in order to act at all) concerned their competence, and their most frequent errors on points of law consisted in overstepping their competence, *i.e.* in excess of jurisdiction. Now in the theory of the English law the decision of a court of limited jurisdiction in excess of jurisdiction is absolutely void. In pure theory, therefore, there was no need of providing any means of appeal from such decisions in excess of jurisdiction; since they were void, they could always be impugned collaterally. In practice, however, it was clearly inconvenient to have the validity of a decision tested in this way. Not only would it be unfair to give to the individual no remedy except the right to refuse to obey the void order or decision and, on prosecution, to allege collaterally its illegality and invalidity,<sup>1</sup> but it would take up altogether too much of the time of the ordinary courts to oblige them to examine, whenever the claim of invalidity might be raised collaterally, whether all the provisions of the law giving jurisdiction had been complied with. Accordingly we find that from an early period the acts of the most important of these authorities of limited jurisdiction, not proceeding in accordance with the common law (*viz.* the justices of the peace), were treated collaterally in much the same way as the acts of the ordinary courts of common law and general jurisdiction. Thus, in the case of *Rex vs. Venable*<sup>2</sup> the court said: "We will not presume that they acted unlawfully." But if the collateral attack was refused, a means of direct attack must be furnished. Therefore from an early time the certiorari was made use of to quash an act that was admittedly void. The most instructive of the early cases on this point are those of *Rex vs. Inhabitants of Glamorganshire*,<sup>3</sup> known as the Cardiff Bridge case, and *Groenwelt vs. Burwell*.<sup>4</sup> In the first the question was as to the propriety of the issue of the certiorari to justices of the peace to

<sup>1</sup> *Cf.* Justinian's Codex, 2, 40, 5, 1: *Melius . . . est intacta jura . . . servari quam post causam vulneratam remedium quaerere.*

<sup>2</sup> 1 Strange, 630. See also *Rex vs. Cleg*, 1 Strange, 475, and note to 7 T. R. 633, where it was held that a conviction by a justice could not be impeached collaterally any more than the judgment of a court of general jurisdiction. *Cf.* Freeman, *Judgments* (3d ed.), secs. 122, 520.

<sup>3</sup> 1 Ld. Raymond, 580.

<sup>4</sup> *Ibid.* 454, 469.

quash, for excess of jurisdiction, their action in ordering money to be levied for the repair of Cardiff bridge. Objection was made to the issue of the writ on the ground that it was not necessary; since if the justices had proceeded according to the statute there was no reason to remove their order into the royal court, but if not, then what they did was *coram non judice* and void and parties might examine the legality of the proceedings collaterally in an action. But the court held that it would examine the proceedings of all jurisdictions erected by act of Parliament; and if under pretence of such an act they proceeded to encroach jurisdiction to themselves greater than the act warranted, the court would send a certiorari to them to have their proceedings returned there, to the end that the court might see that they kept themselves within their jurisdiction and if they exceeded it to restrain them. In *Groenwelt vs. Burwell* it was said that by common law the court would examine by certiorari if other courts proceeding not in accordance with the common law exceeded their jurisdiction.<sup>1</sup> Thus, notwithstanding the general theory concerning void acts, the decision of the question of jurisdiction was originally the province of the writ of certiorari to review a determination; and the fact that the act to be reviewed was void was no bar to the issue of the writ. This rule seems to have been adopted in this country. Judge Savage of New York said: "There are many cases in our reports of justices' judgments reversed where they were utterly void."<sup>2</sup> Again, in *Fitch vs. Commissioners*,<sup>3</sup> the court said that the fact that an order is void does not preclude the party from treating it as voidable<sup>4</sup> and bringing certiorari to quash it.<sup>5</sup>

<sup>1</sup> See also *Rex vs. Morley*, 2 Burrows, 1040, where it is said that "a certiorari goes to see whether a limited jurisdiction have exceeded their bounds."

<sup>2</sup> *Starr vs. Rochester*, 6 Wendell, 564, 567.

<sup>3</sup> 22 Wendell, 132, 135.

<sup>4</sup> The reasoning here is confused. The law may, and in fact every system of law does, provide in certain cases for a judicial declaration that a void act is void. This is the purpose of the French *action en nullité* and of the German *Nichtigkeitssklage*. The English law has inherited from the canon law a similar procedure in the case of a marriage void *ab initio*. The fact that a distinct form of procedure is provided to test the question of nullity does not turn the void act into a voidable act; and in such cases it is inexact and confusing to say even that the void act is "treated as voidable."

<sup>5</sup> See *Stone vs. Mayor, etc.*, 25 Wendell, 157, 168, with cases cited; *Swann vs.*

Jurisdiction depends, however, according to the courts, upon the existence of two classes of facts. In the first place the law must have given the power to act in the case. In the second place the formalities laid down by the law must have been followed by the authority doing the act; and even if the law does not expressly indicate the formalities to be complied with, still the courts have always insisted upon the doing of certain things in order that the legal proceedings may be regarded as valid. In other words the proceedings must be regular, in order that an authority may be said to have acted within its jurisdiction. The question of regularity of proceedings is thus made a part of the general question of jurisdiction. Still, many of the decisions, among which may be mentioned not a few of those above cited,<sup>1</sup> treat this latter question as a distinct one, and state that certiorari brings up not only the question of jurisdiction, but also that of the regularity of the proceedings.<sup>2</sup> But this was all that the certiorari originally brought up for review. Case after case may be cited to indicate how unwilling the courts were to allow any other questions than those pertaining to the matter of jurisdiction to come up before them on certiorari. They refused for a long time to consider errors upon points of law except where these affected the question of jurisdiction.<sup>3</sup> They have time and time again refused to look beyond the record;<sup>4</sup> they have decided that, when the case brought up turned upon the decision of a question of fact, they would not interfere,<sup>5</sup> — would

Mayor, 8 Gill (Md.) 150; Doolittle *vs.* R. R. Co. 14 Ill. 381; People *vs.* Williamson, 13 Ill. 660; R. R. Co. *vs.* Whipple, 22 Ill. 105; Jeffers *vs.* Brookfield, 1 N. J. L. 38, and *Ex parte* Buckner *et al.*, 9 Ark. 73. In both these last cases the court speaks expressly of quashing void acts.

<sup>1</sup> See particularly Brooklyn *vs.* Patchen, 8 Wendell, 47; Swan *vs.* Mayor, 8 Gill (Md.) 150.

<sup>2</sup> The most common irregularity seems to be failure to give proper notice. This, the courts hold, is sufficient cause to quash the action of administrative authorities on the ground of common right. Fonda *vs.* Canal Appraisers, 1 Wendell, 288; 15 Johnson, 537; Commissioners *vs.* Chase, 2 Mass. 270; Commissioners *vs.* Peters, 3 Mass. 229; State *vs.* Barnes, 8 Me. 135, 137; Ottawa *vs.* R. R. Co., 25 Ill. 43.

<sup>3</sup> King *vs.* Whitbread, 2 Douglas, 549, 553, 555; Birdsall *vs.* Phillips, 17 Wendell, 464.

<sup>4</sup> Wood *vs.* Tallmann, 1 N. J. L. 153; Starr *vs.* Rochester, 6 Wendell, 564, 566; Farley *vs.* McIntire, 13 N. J. L. 190; Andrews *vs.* Andrews, 14 N. J. L. 141.

<sup>5</sup> State *vs.* Senft, 2 Hill (S. C.) 367, 369.

not inquire whether a verdict or decision was against evidence,<sup>1</sup> nor consider the credibility of witnesses.<sup>2</sup> On this account the return to the writ when issued did not bring up the evidence as a part of the record.<sup>3</sup> The only clear exception to this limitation of the province of the writ was to be found in the case of summary convictions before justices, where the courts held that errors of law other than those on the question of jurisdiction were reviewable; that the question of fact, whether the conviction was supported by the evidence, might be examined; and that, in case the courts of review found that the conviction was totally unsupported by the evidence, they might quash it.<sup>4</sup> The reason of this exception is to be found in the necessity of establishing an effective control by officers of a really judicial character in cases involving individual liberty. The justices, as we have seen, were administrative rather than judicial officers; and in these cases of summary convictions the justices acted without a jury and in a manner which was at variance with the usual rules of the English criminal law relative to convictions. In these cases of summary conviction, where the province of certiorari was wider than in other cases, — where it served to review both the law applied and the evidence adduced, — the usual rule was to send up to the court of review the evidence as well as the record.

Further, there are a few English cases which apply the same rule to facts affecting the jurisdiction. A series of cases have held that the action of justices who were in the slightest degree interested might be quashed on certiorari. In fact one of the fundamental rules in regard to jurisdiction has always been that *aliquis non debet esse judex in propria sua causa*.<sup>5</sup> In some of these cases the interest which forfeited jurisdiction had to be

<sup>1</sup> Nightingale, petitioner, 11 Pickering, 168; Baldwin vs. Simmons, 9 N. J. L. 196.

<sup>2</sup> Independence vs. Brompton, 9 N. J. L. 209.

<sup>3</sup> Canal Co. vs. Keiser, 19 Pa. St. 134.

<sup>4</sup> King vs. Smith, 8 T. R. 588; Rex vs. Killett, 4 Burrows, 2063; Rex vs. Vipont, 2 Burrows, 1165; Rex vs. Theed, 2 Strange, 919; People vs. Miller, 14 Johns. 371.

<sup>5</sup> See, e.g., *In re Hopkins*, E. B. & E. 100; *Regina vs. Allen*, L. R. 1 Q. B. 120.

proved *dehors* the record. Thus a conviction for violation of the by-law of a railway company was quashed because some of the justices were shareholders in the company.<sup>1</sup>

The tendency in this country to separate the administration of justice from the administration of government has resulted in making the justices of the peace almost exclusively judicial officers. Their original judicial powers, which were mainly of a criminal character, have been increased by statutes which have given them quite an extensive jurisdiction in minor civil cases. But as they retained the character of courts of limited jurisdiction, not proceeding according to the common law, their acts were reviewed not by writ of error but by certiorari; and as the questions which could be reviewed on certiorari were, as has been shown, simply the questions of jurisdiction and regularity of proceedings, their mistakes of law in civil suits could not be corrected without extending the province of the certiorari and making it as liberal as the writ of error.<sup>2</sup> Such an extension of the province of the writ accordingly appeared in these civil cases. It seems to have gone hand in hand with the extension of the civil jurisdiction of the justices, and to have been accomplished by the courts almost unconsciously. Thus a judgment of justices of the peace in a civil case in Maine was quashed on certiorari because the justices had not required the debtor to make a full discharge of his property as required by law.<sup>3</sup> Here the ground of the quashing of the judgment, as stated by the court, was that after refusing the just demand of the creditor the justices' subsequent action was not warranted by law and they therefore had not jurisdiction. In another case the judgment of the justices was quashed on certiorari because they had refused to allow the creditor to make an examination of a debtor which the law permitted.<sup>4</sup> In spite of some conflict

<sup>1</sup> *Regina vs. Allen*, L. R. 1 Q. B. 120. See also *People vs. Goodwin*, 9 N. Y. 568; *People vs. Wheeler*, 2 N. Y. 82.

<sup>2</sup> The province of the writ of error was enlarged in the time of Edward I.

<sup>3</sup> *Dow et al. vs. True et al.*, 19 Me. 46.

<sup>4</sup> *Little vs. Cochran*, 24 Me. 509. See also on this point *State vs. Stuart*, 6 Strobbart L. (S. C.) 29; *Hayward*, petitioner, 10 Pickering, 358; *Buckmesser vs. Dubs*, 5 Binney (Pa.) 29.

in the decisions,<sup>1</sup> the same rule has been established in New York. It has been decided that, in purely civil cases — *i.e.* in controversies between individuals in regard to purely private rights — the court of review may on certiorari quash the action of the lower tribunal, not only where it has exceeded its jurisdiction or where its proceedings have been irregular, but also where it has made a mistake in the application of principles of law to the particular case; and that, in order to enable the court of review to do this, the lower court must on the return to the writ send up whatever evidence is necessary to enable the higher court to reach its decision. These principles may be regarded as settled by the case of *Morewood vs. Hollister*,<sup>2</sup> decided in 1852, in which all the other cases were reviewed and the doctrine as stated — *viz.* that the court of review may quash the act of the lower court for error in law — was fully and unqualifiedly adopted. But the case of *Morewood vs. Hollister* went a step farther. It decided to apply in these cases the rule which had from time immemorial been applied to cases of summary convictions; *viz.* that the court of review might quash the decision of the lower tribunal if this decision appeared to be absolutely unsupported by the evidence. In the case at bar it decided, on the evidence which it permitted to be sent up, that the lower court had erred in deciding “that the insolvent had in all things conformed to the matters required of him by statute and that he should be discharged from his debts.”

Up to the time when this case was decided (1852) we find few if any decisions enlarging the province of the writ when applied to the decisions of administrative as distinguished from judicial authorities. One case, indeed, had claimed for the court of review the right of quashing the decisions of administrative authorities for errors of law. This was the case of *Baldwin vs. Calkins*,<sup>3</sup> in which the court quashed the act of assessment com-

<sup>1</sup> *Matter of Wrigley*, 4 Wendell, 602, and 8 Wendell, 134; *Anderson vs. Prindle*, 23 Wendell, 616. See also *Roach vs. Cosine*, 9 Wendell, 227; *Brown vs. Betts*, 13 Wendell, 29 (which permitted the introduction of evidence and discussed its weight); *Brooklyn vs. Patchen*, 8 Wendell, 47. But see *Simpson vs. Rhinelanders*, 20 Wendell, 103 which held to the old view.

<sup>2</sup> 6 N. Y. 309.

<sup>3</sup> 10 Wendell, 167.

missioners on the ground that in assessing damages they had made use of a wrong principle of law. But in *People vs. Goodwin*,<sup>1</sup> the contrary view was taken. It was said that

where the authority and jurisdiction depends upon a fact to be proved . . . . and such fact is disputed, the magistrate must certify the proofs given in relation to it for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is final and conclusive and will not be reviewed on a common law certiorari. But the main object of this writ being to confine the action of inferior officers within the limits of these delegated powers, the reviewing court must necessarily re-examine, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact.

The disputed jurisdictional fact in this case was whether the owner of a building situated on land through which a road was to run had given his consent to the laying out of the road as fixed by the commissioners, the consent being necessary to the jurisdiction of the commissioners. While the statement of the principle in this case is quite narrow, it will be noticed that the decision itself is quite in line with the decisions discussed in the preceding paragraph. A similar case is *People vs. Van Alstyne*,<sup>2</sup> where facts in regard to jurisdiction were permitted to be brought up on certiorari. The more liberal principle, however, was not yet established, as may be seen from the next case in point, *viz.* *People vs. Wheeler*.<sup>3</sup> This held that the main inquiry on certiorari relates to the power and jurisdiction of the inferior tribunal, and the question can only be determined by matters appearing in the record. When an examination into collateral facts, not properly appearing in the record, is desired, to show want of power or jurisdiction, the appropriate remedy is not by certiorari.

In this case the attempt was made to show *dehors* the record that the officer whose decision was attacked was the brother of one of the parties concerned in the proceeding. This the court refused to allow, notwithstanding that it was claimed that proof of the relationship, if admissible, would have an important bearing on the question of jurisdiction. This claim was not

<sup>1</sup> 5 N. Y. 568.

<sup>2</sup> 32 Barb 131.

<sup>3</sup> 21 N. Y. 82.

fully admitted by the court. The next case is still stronger in favor of the narrow rule. This is the case of *People vs. Highway Commissioners*,<sup>1</sup> in which the court says distinctly that the office of certiorari

is merely to bring up the record of the proceeding to enable the Supreme Court to determine whether the inferior tribunal has proceeded within its jurisdiction and not to correct mere errors in the course of the proceeding. Here the object seems to bring into review the alleged erroneous rulings of the jury in receiving or rejecting evidence offered on the hearing before them, as though it were a bill of exceptions. Such questions do not arise and cannot be reviewed on certiorari.

The opinion is based on the case of *Birdsall vs. Phillips*<sup>2</sup> which was one of the narrowest of the old cases and had been reversed so far as the purely civil cases were concerned.

But the application of the broader rule to the decisions of judicial bodies could not fail to have an influence upon the courts in their review of the decisions of administrative authorities. The first case, however, which comes out definitely for the application of the same rule to administrative decisions is *Swift vs. Poughkeepsie*,<sup>3</sup> which contains, in a dictum, a distinctly liberal statement of the province of the writ. This was an action against a city to recover taxes paid, on the ground that the assessment was erroneous. The court held that the action did not lie. The acts of the assessors could not thus be impeached collaterally. The plaintiff, it was said, should have availed himself of his remedy by certiorari to declare the assessment void. The judge says :

The plaintiff denies the efficiency of this remedy upon the ground that upon a certiorari the court will only consider the question of jurisdiction, and that in this case if the court found, as it would upon the doctrine now proclaimed, that the assessors had jurisdiction, their determination as to the legality of the taxes could not have been reviewed. It is true that this has been the doctrine of the courts to a considerable extent, upon what ground, either of principle or of necessity, I never could very clearly comprehend. But I think, at this time a more liberal rule would and should be applied ; and that a certiorari

<sup>1</sup> 30 N. Y. 72.

<sup>2</sup> 17 Wendell, 464.

<sup>3</sup> 37 N. Y. 511.



would not bring the naked question of jurisdiction, but the evidence on which the body acted to which the writ was directed as well as the ground or principle of their action, and thus present the whole case for review and if necessary for correction.<sup>1</sup>

While such expressions of opinion as this have not the authority of decided cases, still they show the leaning of the courts; and shortly afterwards we find a case which definitely applies to the decisions of administrative bodies the same rule which had been worked out previously with so great trouble and through so much conflict for the decisions of purely judicial bodies. This was the case of *People vs. Board of Police*,<sup>2</sup> which decided that the court might review the decision of a board of police dismissing a policeman from office, and might reverse the decision if it was, in the opinion of the court, absolutely unsupported by the evidence. Judge Woodruff says:

I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits. Let it once be established that where an officer or board of officers have jurisdiction of the subject or of the persons to be affected and proceed in its exercise according to the prescribed mode or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit and however clear it may be upon undisputed facts that their judgment, decision or order is not warranted—and there is danger that much injustice and wrong may happen without possibility of redress. . . . It may be desirable not to multiply cases in which appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated, when wrong is done, and no great public inconvenience will result from its exercise. I conclude . . . that on this appeal this court have power to examine the case upon the whole of the evidence to see whether, as a matter of law, there was any proof which would warrant a conviction. . . . If there was no evidence . . . if the case were such at the close of the trial that it would have been erroneous to submit the question to a jury, were a like question before a jury in an ordinary action—then the error is an error of

<sup>1</sup> See also, to the same effect, *Baldwin vs. Buffalo*, 35 N. Y. 380, which makes the same intimation and which is approved in the case just cited. The case of *Baldwin vs. Buffalo* also intimated that if the evidence returned showed that the decision of the lower tribunal was incorrect, *i.e.* was absolutely unsupported by the evidence, that the higher court could correct it.

<sup>2</sup> 39 N. Y. 506.

law, and the conviction is illegal ; it rests upon no finding of facts upon evidence tending to sustain such finding ; but as matter of law the relator was entitled to be acquitted of the charge [page 517].

This liberal rule was followed in the case of *People vs. Assessors*,<sup>1</sup> and in *People vs. Smith*,<sup>2</sup> decided in 1871. In this last case Judge Grover says :

Whatever may have been the conflict of authority upon the question whether, upon a common-law certiorari, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject matter, it must now be regarded as settled in this state, that it is the duty of the court in addition thereto to examine the evidence and determine whether there was competent proof of facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated [page 776].

Such is the history of the development of the office of the writ of certiorari, as taken particularly from the cases decided by the courts of New York. It may well be asked why the courts so long distinguished between the province of the writ as a means of reviewing the decisions of purely judicial bodies and its province as a means of reviewing the decisions of administrative bodies, and why the courts enlarged the province of the writ in the one case without enlarging it in the other. The answer is that the ordinary civil jurisdiction given to tribunals not acting in accordance with the common law, *i.e.* to courts of limited jurisdiction, was given as a result of the separation of judicial from administrative functions ; that the writ of certiorari had always been chiefly used in administrative cases, since administrative cases formed the majority of the cases which were decided by these courts of limited jurisdiction ; that with the transfer to them of more purely judicial duties the need was felt of reviewing their decisions on such matters, and a method of appeal had to be provided which should accomplish the same results as the writ of error in judicial cases, and the certiorari in the case of summary convictions. Finally, in most of the cases in which judicial duties were conferred upon these courts

<sup>1</sup> 40 N. Y. 154.

<sup>2</sup> 45 N. Y. 772.

of limited jurisdiction, the statutes granting the jurisdiction provided expressly for an appeal from their decisions by certiorari; and the wording of the statutes was such that the courts felt justified in applying to this "statutory certiorari," as they called it, rules more liberal than those which had been established touching the common-law certiorari. This comes out quite clearly in the case of *Morewood vs. Hollister*.<sup>1</sup> The statute granting the certiorari in this instance provided for a review of the "proceedings." This word the court interpreted to mean "all matters connected with or attending the exercise of the power which are necessary to enable the court of review to determine its validity or correctness." The more liberal rule once established with regard to this statutory certiorari, it was an easy matter to liberalize the office of the common-law certiorari. And fortunate it was for individual rights that this means of development was offered to the courts before the certiorari was confined, as it is now coming to be, to the review of the decisions of purely administrative tribunals. For we are justified in concluding, from the difficulty which the courts found in enlarging the province of the common-law certiorari even with the aid of the statutory certiorari, that without it the certiorari would have remained, in New York at any rate, as narrow a remedy as it was under the common law.

While New York had thus the greatest difficulty in enlarging the province of the writ, New Jersey, it would seem, took a much more liberal view of its use from the beginning. As early as 1839 we find the New Jersey courts holding that the proceedings of administrative bodies might be quashed on certiorari for an erroneous application of principles of law.<sup>2</sup>

The broader rule as to the province of the certiorari, which had been so laboriously evolved by the New York courts and which offered to individual rights so important protection against the arbitrary action of the administration, the people of New York decided to sanction by statute; in order, in the words of Mr. Throop,<sup>3</sup> "to prevent the possibility of re-opening the ques-

<sup>1</sup> 6 N. Y. 309.

<sup>2</sup> N. J. R. R. Co. *vs.* Suydam, 2 Harrison, 25.

<sup>3</sup> In his note to sec. 2140 of the New York Code of Civil Procedure.

tions thus decided,<sup>1</sup> and to declare definitely that the cases holding the other way were obsolete." Section 2140 of the code, which is simply declaratory of the New York common law as then understood, provides that in addition to the questions of jurisdiction, regularity of proceedings and errors of law, the court may decide whether there was any competent proof of all facts necessary to be proved in order to authorize the making of the determination; and, if there was such proof, whether there is upon all the evidence such a preponderance of proof against the existence of any of the facts that the verdict of a jury in affirmation thereof, rendered in an action in the Supreme Court triable by jury, would be set aside by the court as against the weight of evidence. The meaning of this section is shown to be identical with the common-law rule adopted before the passage of this section, by the cases of *People ex rel. Hogan vs. French*,<sup>2</sup> and *People ex rel. McAleer vs. French*,<sup>3</sup> which hold that the Supreme Court may reverse the decision of the subordinate tribunal only where it is absolutely unsupported by proof. If there is any proof at all to support the decision it will be upheld, as the court will not determine the preponderance of proof.

The New York rule as to the province of certiorari has been adopted in Michigan in *People vs. Jackson*.<sup>4</sup> Judge Cooley, who rendered the opinion of the court, seems to think that in permitting errors of law outside of jurisdictional questions to be reviewed on certiorari the court is not extending at all the province of the writ of certiorari at common law. He regards the early rule in New York, in accordance with which only the record was returned and only jurisdictional questions considered, as not supported by the early English cases; and in order to show that evidence *dehors* the record might originally be returned he cites a series of cases. Most of these on examination turn out to be cases in which summary convictions were being examined; and it will be remembered that in these cases

<sup>1</sup> *I.e.* by *People vs. Smith*, 45 N. Y. 772, the last case on the point before the passage of this section.

<sup>2</sup> 119 N. Y. 493.

<sup>3</sup> 119 N. Y. 502.

<sup>4</sup> 9 Mich. 111, followed in *Hyde vs. Nelson*, 11 Mich. 353, 357.

the New York practice was to require the return of the evidence and to quash the conviction if not supported by the evidence. The only cases cited by Judge Cooley which do not relate to summary convictions and which are in point simply prove that on certiorari jurisdictional facts should be returned and considered — which was the rule in New York, as is shown by the case of *People vs. Goodwin*.<sup>1</sup> That in England the purpose of the certiorari was not to correct mistakes of law may be seen from the decision in the case of *King vs. Justices*,<sup>2</sup> where the court held the contrary view and where Lord Tenterden said :

The late decisions establish, however, that we cannot assume to ourselves the jurisdiction of a court of error and revise the judgments of the court of Quarter Sessions. . . . Assuming the judgment to be erroneous, I think we have not jurisdiction as a court of error to review it.

Judge Cooley further argues that the old English rule must have been the liberal one from the fact that in those cases where the statute has shut out the certiorari, which of late years are very common, the court may still issue it to review the question of jurisdiction. This is undoubtedly true. But it must be remembered that from the beginning the purpose of the writ of certiorari was to review the regularity or irregularity of proceedings as well as the naked fact of jurisdiction ; and this question of regularity of proceedings is really what the various statutes forbidding certiorari have shut out from review. This may be seen from the case of *Ex parte Hopwood*,<sup>3</sup> in which the judge says :

The certiorari is taken away, so we cannot interfere unless they [the justices] have acted altogether without jurisdiction. . . . But the question now is whether we can review the mode in which they have exercised their jurisdiction.

The point decided in the case was that the mode in which the subordinate tribunal had exercised its jurisdiction could not be reviewed.

<sup>1</sup> 5 N. Y. 568.

<sup>2</sup> 8 Barn. & Cress. 137.

<sup>3</sup> 15 Ad. & El. N. S. 121.

The liberal New York rule has been adopted also in Wisconsin. This has been done partly by statute, providing for a statutory certiorari or an appeal from the judicial acts of the justices ; and partly by judicial decision, as regards proceedings of a summary character and out of the course of the common law, *i.e.* administrative decisions. The case of *Iron Co. vs. Schubel, Town Clerk*,<sup>1</sup> decided in 1872, holds that mistakes and errors of law may be corrected on certiorari.<sup>2</sup>

The better rule at the present time, as derived from these decisions, is that the province of the writ of certiorari is to quash the decision of a subordinate administrative tribunal : first, because it has exceeded its jurisdiction ; second, because it has not followed the formalities required by law ; and third, because it has made an error in the application of a principle of law to the case at bar — among which errors of law is to be included the finding of a fact unsupported by evidence. And to the end that the court of review may decide these points, it is necessary that the lower court send up in addition to the mere record all facts which are material, especially the evidence.

But this liberalizing of the old rule does not mean that the courts will control by means of certiorari the discretion of the subordinate tribunal whose acts are reviewed. The courts do not allow the subordinate tribunal so to make use of its discretion as to come to a decision which is absolutely unsupported by evidence ; but so long as its discretion is not thus abused, the courts as a general rule will refuse to control it in any way. One of the first cases in New York which attempted to enlarge the province of the writ<sup>3</sup> held that, while the decision of the lower authority might be quashed on the ground that it had applied a wrong principle of law, — in this case it had assessed damages on a wrong principle, — still the assessment of damages as to amount by the lower authority was absolutely conclusive and could not be changed by the court on certiorari. A

<sup>1</sup> 29 Wisc. 444.

<sup>2</sup> See also *State vs. Supervisors*, 24 Wisc. 286; *State vs. Whitford*, 54 Wisc. 150.

<sup>3</sup> *Baldwin vs. Calkins*, 10 Wendell, 167.

similar principle was laid down in a considerably later case,<sup>1</sup> where it was said that the justice or injustice of an assessment for local improvements could not be examined on certiorari. The same principle, *viz.* that the discretion of lower authorities may not be controlled by the courts on certiorari, has been established in other commonwealths. In the case of *Hayward, Petitioner*,<sup>2</sup> the court, although it permitted the evidence to come before it in order that it might ascertain whether a correct principle of law had been applied, said that it would not reverse the decision of the justices on the ground that the evidence did not warrant such a decision; since "that was a matter submitted by the statute to their judgment, and we cannot revise their decision upon it." In the case of *Borough of Sewickly*,<sup>3</sup> the court held that the soundness of the discretion of an authority in incorporating a borough is not subject to review on certiorari. In *Commissioners' Court vs. Banne*,<sup>4</sup> it was declared that "upon the question of the expediency of opening or altering a public road the commissioners' court exercises a quasi-legislative power and its decision is not reviewable." The same principle has been applied by the courts of New York to the question of the assessment of property for purposes of taxation.<sup>5</sup> In the case of *People vs. Trustees*<sup>6</sup> Judge Earle said:

The statute makes them [the assessors] the judges of the value of the property for the purposes of taxation. They are required to exercise their judgment as to its value, notwithstanding any proof that may be produced before them, and the case would be a very extraordinary one which would authorize the Supreme Court upon certiorari to review their judgment. Indeed, it would be quite impracticable in most cases for the Supreme Court upon certiorari to correct the judgment of the assessors as to value, and my attention has been called to no such case.

It is pretty clearly the rule, therefore, that the courts will not on certiorari control the discretion of subordinate authorities. But for various reasons this rule has become unsatisfactory to

<sup>1</sup> *People vs. Brooklyn*, 4 N. Y. 419 (1851). See also *Le Roy vs. Mayor*, 20 Johns. 430.

<sup>2</sup> 10 Pickering, 358.

<sup>3</sup> 2 Grant's Cases (Pa.) 135.

<sup>4</sup> 34 Ala. 464.

<sup>5</sup> For the general principle as to assessments see *Cooley, Taxation* (2d ed.), p.

the individuals whose interests are affected by these discretionary administrative decisions. The chief cause of dissatisfaction is to be found in the great number and relative irresponsibility of the administrative authorities that have sprung up in this country as a result of the separation of the administration of government from the administration of justice. Under the old English system most of the really important administrative duties were discharged either directly by, or under the supervision of, the justices of the peace, who had obtained a well-recognized position as judges and who, from the manner of their choice and from the high social position they occupied, commanded the respect of the people and offered guarantees for impartial and wise administration. Under the new system, which has established a host of smaller and less important offices with no permanence of tenure, the same confidence has not been felt in their wisdom and impartiality. Under the old system no special need was felt for the extension of the province of the writ so that it might control the discretion of the justices. Under the new system, however, there has been felt a need of controlling the less wise and more arbitrary action of subordinate administrative officers. For individual rights may be violated as well by misconception of facts and indiscretion in action as by an excess of jurisdiction or a wrongful application of the law.

A further reason for dissatisfaction is found in the fact that there has never been in this country any tribunal to which appeals might be taken from the decisions of administrative authorities as to questions of discretion and expediency. In England the Star Chamber of the Privy Council and, after its abolition, the court of Quarter Sessions in each county constituted a sort of administrative court, with power to review the discretionary decisions of administrative authorities. In this country we have never been able, except in rare cases, to develop any administrative jurisdiction — *i.e.* any judicial control over the acts of administrative authorities — except that which is to be found in the power of the courts to issue certiorari and other writs of a similar character, *e.g.* mandamus, quo warranto, prohibition and injunction. This is the only



relief which our system of administration offers to the individual whose rights have been injured by administrative decisions.

We find, accordingly, some indications of a tendency to extend the province of certiorari over discretionary decisions. In some cases the courts themselves, notwithstanding their usual conservatism, have felt obliged to relax the strictness of their rule; and in other cases the legislatures, finding that the courts were unwilling to give to the individual the relief demanded, have come to the rescue and have by statute enlarged the province of the writ so that the courts might on certiorari control the discretion of administrative authorities. This movement has just begun and has not as yet attained such dimensions as seriously to undermine the general rule. It is nevertheless worthy of careful examination.

In the first place, as I have said, the domain of administrative discretion has been invaded by the courts themselves. The courts have held in a series of cases that, where a statute provides that an officer may be removed from office for cause only, the courts have the right to control the discretion of the removing officer in deciding what is cause.<sup>1</sup> The courts, it is true, have not grounded their decisions on any desire to control the discretion of administrative officers, but on the proposition that the question, what is cause, is not a question of discretion but a question of law. But this does not alter the fact that, as a result of these decisions, the courts do exercise a control over the discretion of administrative officers — and that too upon a point where many think it necessary that the administration should possess full and unlimited discretion. There are besides a few other cases in which the courts — particularly those of New Jersey, which have taken in almost every respect a more liberal view of the province of the writ than the courts of other commonwealths — have exercised a direct control over the discretion of administrative authorities. Thus in the case of *Ex parte*

<sup>1</sup> Cases on this point are *People vs. Board of Police*, 72 N. Y. 415; *People vs. Board of Fire Commissioners*, 72 N. Y. 445; *State vs. St. Louis*, 90 Missouri, 19; *Stockwell vs. Township Board*, 22 Mich. 341. See also *Kennard vs. Louisiana*, 92 U. S. 480.

New Jersey Railroad Co.,<sup>1</sup> it was held that the court might issue the writ to certain commissioners on the ground that the damages which they had assessed were excessive; while in *Bellis vs. Phillips*<sup>2</sup> the court intimated that it would interfere with the judgment of the lower court on the verdict of a jury if it were made plainly to appear that gross injustice had been done.

In the second place the legislatures have taken up the cause of the individual and have in several cases so enlarged the province of the certiorari as to force the courts through it to control the discretion of administrative authorities. The point in the administrative system of the United States where the need of some control over administrative discretion is most keenly felt is in the matter of assessments for purposes of taxation. There is no other place in the whole realm of administrative action where the interests of the individual come into so direct conflict with the administration, and there is no place where some remedy against unjust administrative decisions is more needed. But, as has been shown, the almost universal rule in this country is that administrative discretion in the assessment of property for taxes cannot be controlled on certiorari. To meet the desire for a remedy, some of our commonwealths have created a special statutory appeal to some court which commands the confidence of the people in a higher decree than do the assessors. In New York, however, the legislature has met this demand by enlarging the province of certiorari. By the laws of 1859, chapter 302, section 20, it was provided that a certiorari to review or correct on the merits any decision or action of the tax commissioners of New York city should be allowed by the Supreme Court on the petition of the party aggrieved. It is a significant fact that the granting of this remedy was coincident with the introduction of paid professional assessors in place of assessors elected by the people. In the year 1880 a similar provision was made for the entire state.<sup>3</sup> By the statute then passed a certiorari may issue from the Supreme Court on the petition of any person aggrieved by the assessment, and the court may examine the questions of the illegality of the assess-

<sup>1</sup> 16 N. J. L. 393.

<sup>2</sup> 28 N. J. L. 125.

<sup>3</sup> Laws of 1880, chap. 269.

ment, its incorrectness by reason of overvaluation, and its unfairness by reason of inequality (*i.e.* because the assessment complained of is at a higher rate than assessments of other property on the same assessment roll). If the allegations shall on the return appear to be proven, the court may order such assessment, if illegal, to be stricken from the roll; if erroneous or unequal, it may correct it so as to make it fair and equal, or it may order a re-assessment. A somewhat similar provision has been made for the assessment of corporation taxes in New York.<sup>1</sup>

Similar provision for judicial control of the discretion of administrative officers is frequently made in the excise laws. Such was the case with the "substitute" excise bill lately before the New York legislature. But in these cases it is usually the discretion in refusing a license, not the discretion in granting one, that is subjected to judicial control.

As the purpose of certiorari was originally simply to quash the action of the subordinate tribunal, the effect of the decision of the court was usually to quash or to affirm the action appealed from. Several decisions, however, attempted to go further and in proper cases to modify or amend the determination.<sup>2</sup> Here again, in New York, the legislature has stepped in to aid the individual and has provided<sup>3</sup> that the court upon hearing may make a final order, annulling or confirming wholly or in part or modifying the determination reviewed as to any or all of the parties. The Court of Appeals has somewhat limited the application of this section by holding<sup>4</sup> that this section does not give the court the right to modify the discretionary decision within the jurisdiction of the lower authority. The facts in this case were that the Supreme Court amended an order of dismissal of the board of fire commissioners by substituting for dismissal suspension for six months. This, the Court of Appeals held, the Supreme Court was not justified by this section in doing.

<sup>1</sup> See Laws of 1885, chap. 501; Laws of 1889, chap. 463.

<sup>2</sup> See *People vs. Ferris*, 36 N. Y. 218.      <sup>3</sup> Code of Civil Procedure, sec. 2141.

<sup>4</sup> *People vs. Commissioners*, 100 N. Y. 82.

VI. *Conclusions.*

The most important results obtained from this study of the development of the writ of certiorari in this country may be summarized as follows :

(1) In order to meet the demands of a changed administrative system, the number of authorities to which the writ may issue has been greatly increased. In consequence, the writ has largely lost its character of an ordinary judicial appeal and is becoming rather a means of judicial control over administrative action.

(2) The province of the writ has been greatly enlarged, so that by its means errors of law may be corrected and decisions unsupported by the evidence may be quashed.

(3) The decisions of some of the courts and the statutes of several commonwealths show a tendency to subject the discretion of administrative authorities to the control of the courts.

That this development answers modern needs and is in accord with modern tendencies is shown by even a cursory glance at the means of judicial control over administrative action in foreign countries. The same impulse — namely, the desire to protect private rights against executive arbitrariness — which has occasioned this development of the certiorari in the United States, has brought about a considerable enlargement of the jurisdiction of the administrative courts of France and has led to the establishment of similar tribunals in Germany — tribunals all of which have sprung into existence since the middle of this century, and of which the most comprehensive date from the foundation of the German Empire. The problem is everywhere the same ; but our solution differs in one important respect from that which has been adopted on the continent of Europe. There the more complete realization of the principle of the separation of governmental powers, — with its corollary, the independence of the administration over against the judiciary, — forced the publicists to find the means of judicial control over administrative actions in bodies not connected with the ordinary judiciary, and to construct, side by side with the ordinary

courts, a second system of administrative courts. Here we have vested the control over the administration in the ordinary courts. Our solution of the problem differs again from that which has been reached in England. There an ample means of control has been found in the courts of Quarter Sessions and in the device of "stating a case" to the ordinary law courts. We, on the other hand, have gradually remodelled one of the old common-law writs and greatly widened its province.

If the same liberal ideas which have obtained in the immediate past continue to obtain in the future, it seems safe to predict that our present writs will prove amply sufficient to protect private rights from the abuse of administrative discretion, and that we shall find in our ordinary courts a more simple system of judicial control over administrative action than that which has been adopted on the continent of Europe.

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